

(2017) 01 MP CK 0130

MADHYA PRADESH HIGH COURT

Case No: 6853-2015

Hafizulla

APPELLANT

Vs

Shri Puran Chand Jain
S/o Late Sheikhar
Chand Jain

RESPONDENT

Date of Decision: Jan. 11, 2017

Acts Referred:

- Constitution of India, Article 37 - Application of the principles contained In this Part
- Factories Act, 1948, Section 6, Section 92, Sec

Hon'ble Judges: Vivek Rusia

Bench: Division Bench

Advocate: Kuldeep Bhargav, Romesh Dave

Judgement

1. Today, the present writ petition is listed for hearing on I.A. no. 6972/2016, i.e. an application for disposal of the writ petition filed on behalf of the respondent in light of the judgment passed by Hon'ble Apex Court in the case of Lanco Anpara Power Ltd Vs. State of Uttar Pradesh and others, reported in 2016 (10) SCC 329 and dismissal of identical writ petitions by the Principal Bench of this High Court vide order dated 02/12/2016.

2. Shri Bhargva, learned counsel for the petitioner submit that instead of arguing on the said application the writ petition may be heard finally.

3. The petitioner has approached this Court being aggrieved by the show-cause notice dated 01/09/2015 issued by the Assessing Officer, Under Building and other Construction Welfare Cess Act Cum Govt. Labour Officer, Dewas, (in short "BOCW Act"?), by which the petitioner was directed to appear in the assessment

proceedings as he has failed to produce the information before the Assessing Officer in Form no. I.

4. The petitioner is a public limited company registered under the Companies Act and owns a factory at Dewas. The petitioner is having licence to run factory since 10 to 15 years. Within the factory premises, the petitioner started construction work of godown for keeping raw materials and finished products. The petitioner applied for approval of the building plan and map, which was approved by the Chief Inspector of Factories under section 6 of the Factories Act. As per the approval granted, the petitioner commenced construction work of the godown and at the time of filing this petition, it was under process of completion.

5. The Authorities under the Building and Other Construction Workers (Regulation of Employment and Conditions of Service) Act, 1996 (for short, herein after be referred as the "BOCW Act") issued notice dated 03/08/2014 that you are violating the provisions of section 7 and 46 of the Act and directed to submit an explanation within seven days. In response to the above notice, the petitioner appeared before the Labour Officer along with reply dated 09/08/2014, in which, it is stated that the provisions of BOCW Act are not applicable to them as they are governed under the provisions of the Factories Act and they are making constructions under the approval of the authorities under the Factories Act. It is the case of the petitioner that without deciding his objections, the respondent again sent show-cause notice dated 01/09/2014, by which, the petitioner has been directed to furnish details of the constructions work in the Form " I, failing which, the cess would be assessed exparte. Being aggrieved by the show-cause notice, the petitioner approached this Court by way of writ petition.

6. The sole contention of the petitioner is that they are governed under the provisions of the Factories Act, therefore, the provisions of BOWC Act would not apply.

7. Initially, the respondent filed detailed return to the writ petition raising preliminary objections that the writ petition at the stage of show-cause notice is not maintainable & the petitioner is required to appear before the Assessing Officer. That, along with return, an application for vacating the stay order was also filed in view of the judgement delivered by this Court in the case of Gannon Dunkerley and Co.Ltd (M/s) Vs. State of M.P. and others reported in ILR (2009) M.P. 1280. Later on, the respondent filed an application for dismissal of the petition in light of the judgment passed by the Apex Court in the case of Lanco Anpara Power Ltd Vs. State of Uttar Pradesh and others, reported in 2016 (10) SCC 329

8. The State has placed reliance over the judgment passed by the Principal Bench of this Court in various writ petitions, where, it has been held that the liability to pay

the cess and other questions are covered and answered by the Apex Court in case of Lanco Anpara Power Ltd (Supra) against the petitioner and the liberty has been granted to the petitioner to raise the objections as may be, permissible under the law before the Assessing Officer in respect of assessment of cess and if the assessment has been made finally, then they are free to file appeal before the statutory appellate authority.

9. Shri Bhargava, learned counsel for the petitioner submits that the case of the petitioner is on different footing than the case decided by the Apex Court as well as by this Court. It is further submitted that in that case, the factory was under construction and yet to start the construction activity under the Factories Act and no manufacturing operation had commenced, but in the present case, the petitioner is already running factory and within the factory premises, he is making certain constructions. Since the production work is in operation, therefore, the petitioner is governed under the provisions of the Factories Act and the provisions of BOCW Act would not apply.

10. The Section 2 (d) of BOCW Act excludes the building and the constructions work, to which the provisions of Factories Act 1948 & Mines Act 1952 applies. He has drawn attention of this Court towards the provisions of section 2(d) of the Factories Act, 1948, where the word "factory" is defined and according to him, the factory means any premises, where the manufacturing process is being carried out with the aid of power, and where ten or more workers are working, therefore the construction within the factory premises would also be covered under the provisions of the Factories Act. The BOCW Act has been enacted for the workers working in unorganized sectors. The term "unorganized sector" and "unorganized workers" are defined under the Unorganized Workers Social Security Act, 2008 and as per the definition of 2(m), the unorganized workers means the workers working in home, self-employed worker or a wage worker in unorganized sector, who are not covered by any of the Act mentioned in Schedule-II. It is submitted that the employee working in the petitioner's factory are already governed under the provisions of Standing Orders, therefore, there cannot be two sets of service conditions for them. If the petitioner do not follow the provisions of the Factories Act, then he would be liable to suffer penalty under section 92 of the Factories Act.

11. Shri Romesh Dave, learned GA for the respondent submits that each and every questions raised in this petition by the petitioner has been answered by the Apex Court in the case of Lanco Anpara Power Ltd Vs. State of Uttar Pradesh and others (supra). He has referred para nos. 32 to 39 of the judgement and submits that the petition is liable to be dismissed. It is also submitted that the writ petitioners before the Principal Bench are also by those petitioners who have existing running factory and they started the construction work within the factory premises and their writ petitions have already been dismissed, therefore, the present writ petition is also

liable to be dismissed.

12. This fact is disputed by Shri Bargava, learned counsel for the petitioner, but no material has been produced to establish that the petitioner before the Principal Bench are yet to commence the production or having running factory, but from the names of the petitioners, it is apparent that maximum petitioners are already having running industries/Factories.

13. The sole contention of the petitioner is that whether the provisions of the Factories Act" 1948 applies or the provisions of BOWC Act would not apply. This question has been answered by the Apex Court in the judgment of Lanco Anpara Power Ltd Vs. State of Uttar Pradesh and others (supra). Pare 32 to 39 of the judgment is reproduced below :

32 Section 2(k) of the Factories Act defines "manufacturing process" in the following manner:

(k) "manufacturing process" means any process for

i.making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or [pumping oil, water, sewage or any other substance; or] generating, transforming or transmitting power; or [composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding;] [or] constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels;[or] (vi) [preserving or storing any article in cold storage;]

33 It is also necessary to take note of the definition of "worker", which is contained in Section 2(l) of the Factories Act. It reads as under: "worker" means a person 8[employed, directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not], in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process 7[but does not include any member of the armed forces of the Union];

34 On the conjoint reading of the aforesaid provisions, it becomes clear that "factory"? is that establishment where manufacturing process is carried on with or without the aid of power. Carrying on this manufacturing process or manufacturing activity is thus a prerequisite. It is equally pertinent to note that it covers only those workers who are engaged in the said manufacturing process. Insofar as these appellants are concerned, construction of building is not their business activity or manufacturing process. In fact, the building is being constructed for carrying out the particular manufacturing process, which, in most of these appeals, is generation, transmission and distribution of power. Obviously, the workers who are engaged in construction of the building also do not fall within the definition of "worker" under the Factories Act. On these two aspects there is no cleavage and both parties are at ad idem. What follows is that these construction workers are not covered by the provisions of the Factories Act.

35 Having regard to the above, if the contention of the appellants is accepted, the construction workers engaged in the construction of building undertaken by the appellants which is to be used ultimately as factory, would stand excluded from the provisions of BOCW Act and Welfare Cess Act as well. Could this be the intention while providing the definition of "building and other construction work" in Section 2(d) of BOCW Act? Clear answer to this has to be in the negative. 36 We may mention at this stage that High Court is right in observing that merely because the appellants have obtained a licence under Section 6 of the Factories Act for registration to work a factory, it would not follow therefrom that they answer the description of the "factory"? within the meaning of the Factories Act. We have reproduced the definition of "factory" and a bare reading thereof makes it abundantly clear that before this stage, when construction of the project is completed and the manufacturing process starts, "factory" within the meaning of Section 2(m) of the Factories Act does not come into existence so as to be covered by the said Act.

37 We now advert to the core issue touching upon the construction of Section 2(d) of the BOCW Act. The argument of the appellants is that language thereof is unambiguous and literal construction is to be accorded to find the legislative intent. To our mind, this submission is of no avail. Section 2(d) of the BOCW Act dealing with the building or construction work is in three parts. In the first part, different activities are mentioned which are to be covered by the said expression, namely, construction, alterations, repairs, maintenance or demolition. Second part of the definition is aimed at those buildings or works in relation to which the aforesaid activities are carried out. The third part of the definition contains exclusion clause by stipulating that it does not

include "any building or other construction work to which the provisions of the Factories Act, 1948 (63 of 1948), or the Mines Act, 1952 (35 of 1952), applies". Thus, first part of the definition contains the nature of activity; second part contains the subject matter in relation to which the activity is carried out and third part excludes those building or other construction work to which the provisions of Factories Act or Mines Act apply.

38 It is not in dispute that construction of the projects of the appellants is covered by the definition of "building or other construction work"? as it satisfies first two elements of the definition pointed out above. In order to see whether exclusion clause applies, we need to interpret the words "but does not include any building or other construction work to which the provisions of the Factories Act "apply". The question is as to whether the provisions of the Factories Act apply to the construction of building/project of the appellants. We are of the firm opinion that they do not apply. The provisions of the Factories Act would "apply"? only when the manufacturing process starts for which the building/project is being constructed and not to the activity of construction of the project. That is how the exclusion clause is to be interpreted and that would be the plain meaning of the said clause. This meaning to the exclusion clause ascribed by us is in tune with the approach adopted by this Court in *Organo Chemical Industries v. Union of India*[11]. Two separate, but concurring, opinions were given by Justice V.R. Krishna Iyer and Justice A.P. Sen, and we reproduce here below some excerpts from both opinions:

"Justice A.P. Sen (para 23)

Each word, phrase or sentence is to be considered in the light of general purpose of the Act itself. A bare mechanical interpretation of the words "devoid of concept or purpose" will reduce much of legislation to futility. It is a salutary rule, well established, that the intention of the legislature must be found by reading the statute as a whole.

Justice V.R. Krishna Iyer (para 241)

A policy-oriented interpretation, when a welfare legislation falls for determination, especially in the context of a developing country, is sanctioned by principle and precedent and is implicit in Article 37 of the Constitution since the judicial branch is, in a sense, part of the State. So it is reasonable to

assign to "damages" a larger, fulfilling meaning."?

39 The aforesaid meaning attributed to the exclusion clause of the definition is also in consonance with the objective and purpose which is sought to be achieved by the enactment of BOCW Act and Welfare Cess Act. As pointed out above, if the construction of this provision as suggested by the appellants is accepted, the construction workers who are engaged in the construction of buildings/projects will neither get the benefit of the Factories Act nor of BOCW Act/Welfare Cess Act. That could not have been the intention of the Legislature. BOCW Act and Welfare Cess Act are pieces of social security legislation to provide for certain benefits to the construction workers.

14. The Apex Court finally answered in para 47 of the judgment and held that the construction workers are not covered by the Factories Act"1948, therefore, welfare measures specifically provided for such workers under the BOCW Act and Welfare Cess Act cannot be denied. Para 47 is reproduced below:

"It is stated at the cost of repetition that construction workers are not covered by the Factories Act and therefore, welfare measures specifically provided for such workers under the BOCW Act and the Welfare Cess Act cannot be denied"?

15. Therefore, the construction activity within the factory premises is being carried out by the workers of the contractors are not covered under the provisions of the Factories Act. The provisions of the Factories Act are applicable to those workers, who are employed by the Factory owner. The workers who are engaged in the construction activity are the workers of the contractor and not the workers of the factory owner.

16. The construction of civil work is altogether different work, which is nothing to do with the main industrial activity of the factory. The permission, which was given to the petitioner by the Chief Factory Inspector dated 23/09/2008 was under the provisions of the Factories Act with certain terms and conditions. Condition no. 6 specifically provides that this permission does not absolve the petitioner from any other enactment or rules. That does not mean, after taking permission under the Factories Act, they are not covered in any other enactment.

17. The apex Court in case of Lanco Anpara Power Ltd (Supra) has held that the BOCW/Welfare Cess Act is a piece of welfare legislation by which certain protection

and benefits has been granted to the workers engaged in the construction activities. Finally in para 47, it has been concluded that the construction workers are not covered by the Factories Act" 1948, therefore, the welfare measures specifically provided for such workers in a BOCW Act/Welfare Cess Act cannot be denied. This finding was given in a case where the factory was under construction and about to start. Here in the present case, the factory is already functioning but certain construction activities are going on in addition to the factory. Hence, it makes no difference whether construction work is related to start the factory or within the running factory.

18. It is not the case of the petitioner that in the construction activity his own regular workers are engaged who are already covered under the provisions of Factories Act" 1948 but the workers who are engaged in the construction work are not the workers & employees of the petitioner and hence, would not be covered under the provisions of Factories Act" 1948, therefore, the benefit and the welfare measures provided under the BOCW Act cannot be denied to them, therefore, the authorities under the BOCW act & Rules has not committed any error while issuing notice to the petitioner.

19. That the Principal bench of this High Court vide judgement dated 02.12.2016 in W.P.No.1777/2009 has granted liberty to the petitioners to raise the objections as permissible under the law before the Assessing Officer and disposed of the writ petition in view of the judgement passed in case of Lanco Anpara Power Ltd (Supra). The liberty of filing appeal has also been granted to the petitioner, therefore, the present petition is also disposed of with a liberty to raise the objection as may be permissible under the law before the Assessing Officer & thereafter to file appeal before the appellate authority.

20. The writ petition is disposed of. No order as to costs